IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P. No. 208 of 2007
DATE OF DECISION: 8.8.2007

Sukhdeep Singh Bhoday

…Petitioner

Versus

Joint Director General of Foreign Trade and others

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Jagmohan Bansal, Advocate,
for the petitioner.

Mr. Sanjeev Kaushik, Advocate,
for the respondents.

JUDGMENT

M.M. KUMAR, J.

A short question raised in this petition filed under Article 226 of the Constitution is "whether 'proceedings for prosecution for any such offence' within the meaning of Section 127H of the Customs Act, 1962 (for brevity, 'the Act'), are deemed to have commenced on the date of registration of FIR or when challan is presented before the Magistrate". The question emerges from order dated 14.9.2006 (P-5), passed by the Settlement Commission, Customs and Central Excise, Mumbai-respondent No. 3 (for brevity,

'the Settlement Commission'), on an application filed by the petitioner along with others under Section 127-B of the Act. The Settlement Commission has declined the prayer of the petitioner for grant of immunity from prosecution by concluding that proceedings for prosecution have already commenced when FIR against the petitioner were registered.

Facts in brief which emerge from the order of the Settlement Commission and from the averments made in the petition are that the petitioner obtained advance licences on 16.12.2002 under DEEC Scheme in the name of M/s Bhoday International, 94, Ahluwalia Street, Miller Ganj, Ludhiana. The import licence for duty free import of 174.260 MT CRCA Sheet/Coil (Second/Defective 8-28-G) for a CIF value of US$ 41,823 (Rs. 20,49,300/-) with an export obligation to export the products for a FOB value of export worth US$ 53,350 (Rs. 26,14,150/-). The petitioner is the proprietor of the firm. The firm imported goods and sold them in the domestic market illegally. The petitioner submitted a bill dated 19.12.2002 alongwith original bank certificate of realization, invoice, packing list and statement of export claiming to have discharged his export obligation. He requested for waiver of condition concerning bank guarantee. Accordingly, condition concerning bank guarantee was waived on the basis of the documents submitted and the petitioner's firm was allowed to import goods worth US$ 41,160 (Rs. 20,16,869/-). Acordingly it imported the goods and availed custom duty exemption of Rs. 11,68,538/-. When the case was referred to Custom Authorities, Mumbai, to confirm the genuineness of shipping bill

dated 19.12.2002, it was found that the bill was bogus. The petitioner's firm, in fact, imported goods and sold them in the domestic market illegally. It was alleged that the petitioner's firm violated the stipulated provisions of the Act and notifications dated 1.4.1997, 27.4.2000 and 19.4.2002. The total duty saved on the imports stood at Rs. 52,55,137/-.

After investigation a common show cause notice dated 28.11.2004 was issued to the petitioner alongwith others by the Additional Director General, DRI, Regional Unit, Ludhiana, inter alia, demanding duty of Rs. 52,55,137/- from the petitioner besides proposing confiscation, invoking interest and penal provisions of the Act. The show cause notice is pending adjudication. It is appropriate to mention that two FIRs bearing Nos. 88, dated 12.7.2004 and 22, dated 3.4.2005 were registered at Police Station Division No. 2, Ludhiana, under Sections 420, 467, 468, 471 and 120B IPC on the complaint made by the Joint Director General of Foreign Trade, Ludhiana-respondent No. 1. The petitioner was arrested on 4.3.2005. It was during the pendency of the adjudication of the show cause notice that the petitioner filed an application under Section 127-B of the Act before the Settlement Commission-respondent No. 3, admitting full duty liability and prayed for immunity from prosecution, fine, interest and penalty. The charge sheets after completion of investigation in the aforementioned FIRs were submitted on 6.2.2006 and 27.3.2006. The Settlement Commission partly accepted the application filed by the petitioner vide his order dated 14.9.2006 (P-5) and refused to grant immunity from

prosecution under proviso to Section 127-H of the Act. The order of the Settlement Commission as reflected in para 9 in so far it is relevant is extracted below, which reads as under:-

> "……this case is not fit for granting immunity from prosecution since in terms of proviso (1) of Section 127H of the Act proceedings for the prosecution was instituted right before the date (31.01.2006) of receipt of the application for settlement, as concerned FIRs were filed before JMIC/Ludhiana on May 2004 and 24.08.04. The wordings in the Finance Act and decisions relied upon by the ld. Advocate relate to an expression, "…… where prosecution for any offence….. has been instituted….." whereas on the other hand, the proviso (1) of Section 127H of the Act stipulates that "…no such immunity shall be granted…….where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under Section 127B". Thus the wordings are entirely different in the Finance Act, 1998 and emphasis is on institution of prosecution whereas in the said Customs Act, emphasis is on institution of proceeding for prosecution (Emphasis supplied). We further observe that the applicant has admitted entire duty liability as demanded vide the impugned Show Cause Notice and the applicant has made full and true disclosure of its duty liability and has co-operated in the proceedings before

the Bench. Accordingly, the Bench passes the following order under Section 127C(7) of the Act for settlement of this case:-

Customs duty: xxx xxx xxx xxx

Interest: xxx xxx xxx xxx

Fine and Penalty: xxx xxx xxx xxx

Prosecution: In this case, FIRs were filed on 24.08.2004 and in May, 2004 and these dates should be taken as the dates on which proceeding for prosecution has been instituted. In view of the same, no immunity from prosecution is granted to the applicant under proviso (1) of Section 127H of the Act."

It is further appropriate to mention that the Settlement Commission did not agree with the contention raised by the petitioner that the expression "institution of proceedings for prosecution" would necessarily mean presentation of challan and if the application has been filed by the petitioner under Section 127-B of the Act before the date of presentation of challan then there is no bar to grant immunity in terms of Section 127-H of the Act. The argument has been rejected in para 7.3, which reads as under:-

"7.3 He further submitted that proceeding for the prosecution can be said to have been instituted unless the complaint has been taken cognisance by the court. In this case, an application before the Commission was filed before the cognisance of the complaint has been taken by the court. At this juncture the Bench pointed out that the wordings in the Finance Act and decisions

> relied upon by the ld. Advocate relate to an expression, "…..where prosecution for any offence….. has been instituted….." whereas on the other hand, the proviso (1) of Section 127H of the Act stipulates that "…no such immunity shall be granted……where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under Section 127B". Thus the wordings are entirely different in the Finance Act, 1998 and emphasis is on institution of prosecution whereas in the said Customs Act, emphasis is on institution of proceeding for prosecution. In the given case, the proceedings for the prosecution have been instituted before the date of filing application for settlement before the Commission (Emphasis supplied)."

Mr. Jagmohan Bansal, learned counsel for the petitioner has submitted that FIR No. 88, dated 12.7.2004 and FIR No. 22, dated 3.4.2005, were registered at Police Station Division No. 2, Ludhiana, under various provisions of the IPC. The petitioner was also arrested on 4.3.2005. An application under Section 127-B of the Act was filed on 31.1.2006 much before the presentation of challans. Therefore, he has emphasised that the expression 'proceedings for prosecution for any such offence' as used in proviso to Section 127-H of the Act must be construed to mean as to when challan is presented as mere lodging of FIR cannot be treated as proceedings for prosecution. According to the learned counsel, an FIR is merely a First Information Report

which may constitute basis for undertaking investigation by the competent officer. It is only after investigation and presentation of challan that the proceedings for prosecution could be deemed to have been initiated. Learned counsel has pointed out that in cases where on investigation no case is made out then the police has to file cancellation report under Section 169 Cr.P.C. In support of his submission, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Ashirvad Enterprises v. State of Bihar, 2004 (168) E.L.T. 433** and a Single Bench judgment of Madras High Court in the case of **M. Natarajan v. State, 2006 (197) E.L.T. 476 (Mad.)** and argued that although the aforementioned two judgments have arisen from the provisions of Income-tax Act and the power of immunity given to Settlement Commission under Section 245H(1) of the Income-tax Act, 1961, yet the language used in the proviso to Section 245H(1A) being *pari materia* deserves to be adopted for interpretation of proviso to Section 127-H of the Act. He has concluded by submitting that the proviso necessarily has to be construed in the light of principal provision and that the proviso is only an exception to the rule. Therefore, the proviso has to be construed in the light of language and intent flowing from the principal clause. Therefore, the petitioner becomes entitled to grant of immunity and the Settlement Commission has committed grave error in law.

Mr. Sanjeev Kaushik, learned counsel for the respondents has argued that proviso to Section 127-H of the Act specifically exclude grant of any immunity by the Settlement

Commission in cases where the proceedings for prosecution for any offence under the Act have been instituted before the date of receipt of application under Section 127-B of the Act. Supporting the impugned order dated 14.9.2006 (P-5), learned counsel has contended that the FIRs were already registered on 12.7.2004 and 3.4.2005 well before filing of application by the petitioner under Section 127-B of the Act, which in fact was filed on 31.1.2006. He has further argued that the criminal law is set in motion on the lodging of an FIR under Section 154 of the Code of Criminal Procedure, 1973 (for brevity, 'the Code') and it is on that date that investigation against the accused begins. In that regard, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Bhagwan Singh v. State of M.P., (2002) 4 SCC 85**. He has also placed reliance on the language used by Section 154 of the Code, which provides that registration of FIR against an accused result into setting in motion of criminal law. Therefore, it has been asserted that the date of filing of an FIR is relevant date for the purpose of granting immunity to an accused under proviso to Section 127-H of the Act. To substantiate the argument, learned counsel has mentioned that the petitioner was arrested on 4.3.2005, which proves that proceedings under the Code had already been set in motion before filing of the application. Mr. Kaushik has also placed reliance on the judgment of Hon'ble the Supreme Court in the case of Ashirvad Enterprises (supra) to argue that prosecution in the present case is deemed to have been commenced on the date of lodging of FIR and not on the date when the challan was presented.

We have thoughtfully considered the submissions made by learned counsel for the parties, examined the record with their assistance and are of the view that this petition deserve to be allowed. It would be appropriate at the outset to first examine the provisions of Section 127-H of the Act along with its proviso, which reads thus:-

> "127-H. Power of Settlement Commission to grant immunity from prosecution and penalty. – (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 127-B has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also either wholly or in part from the imposition of any penalty, fine and interest under this Act, with respect to the case covered by the settlement:
>
> Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 127-B."

A perusal of sub-section (1) of Section 127-H of the Act shows that when the Settlement Commission after recording

satisfaction that any applicant for settlement under Section 127-B, has cooperated with the Settlement Commission in the proceedings before it and that he has made a full and true disclosure of its due liability to pay duty then it may grant immunity from prosecution for any offence under the Act or under the Indian Penal Code or under any Central Act and could also wholly or in part impose any of the penalty, fine and interest with respect to the case covered by the settlement. However, there is complete bar from granting such immunity from prosecution in cases 'where the proceedings for the prosecution for any such offence under the Act have been instituted before the date of receipt of application under Section 127-B'.

We are of the view that the expression 'proceedings for the prosecution for any – offence' cannot be deemed to have commence on the date of registration of FIR and it must travel to the stage of presentation of challan before the Magistrate. The aforementioned view is based on the policy of law as reflected in the Code. The expression 'proceedings for prosecution for any – offence cannot be construed to mean that once an FIR is registered then it would be deemed that proceedings for prosecution for any offence have been instituted. In that regard reference may be made to the procedure laid down in the Code. After lodging of an FIR, investigation is to be undertaken by the competent officer. The provisions of Sections 155 to 176 of the Code deal with detailed procedure. In cases where the investigation undertaken by the police results into presentation of challan a report under Section 173(2) of the Code is forwarded to the Magistrate, who is empowered to take

cognisance of the offence. However, in other cases where there is no sufficient evidence, the accused has to be released as per the provisions of Section 169 of the Code. It is further significant to notice that even the police report forwarded to the Magistrate to take cognisance of the offence is not binding on the Magistrate. If the Magistrate after taking cognisance comes to a conclusion that the police report showing no evidence is unacceptable then the Magistrate is still empowered to issue process asking the accused to appear. In other words, the police do not enjoy the final word which has been left to be decided by the Magistrate. In that regard reliance may be placed on few judgments of Hon'ble the Supreme Court in the cases of **Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117**; **H.S. Bains v. U.T. Administration Chandigarh, (1980) 4 SCC 631**; and **State of Orissa v. Habibullah Khan, (2003) 12 SCC 129**. These principles have been laid down by Hon'ble the Supreme Court on the basis of a cardinal principle that investigation and 'taking of cognisance' operate in two different areas and their water flows in two parallel channels but they never intermingle [See **H.N. Rishbud v. State of Delhi, AIR 1955 SC 196**]. It further emerges from a perusal of Section 321 of the Code that once the matter has travelled to the Magistrate by virtue of a report submitted under Section 173(2) of the Code then the consent of the court would be necessary. The aforementioned view is supported by a judgment of Hon'ble the Supreme Court in the case of **Assistant Collector of Custom, Bombay v. L.R. Melwani, AIR 1970 SC 962**. In that regard the

observation of their Lordships in para 7 deserves to be extracted extensor, which read thus:-

> "……the proceedings therein contemplated are proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal and "prosecution" in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. ……"

The language of proviso to Section 127-H of the Act is *pari materia* to the language used by Section 91 of the Finance (No. 2) Act, 1998, which fell for consideration of Madras High Court in the case of M. Natarajan (supra). A learned Single Judge while interpreting the provisions of Section 91 of the Finance Act, 1998 has concluded in para 15 as under:-

> " 15. True, this provision of the Scheme shall not apply to any person in respect of whom prosecution for any offence punishable under Chapter IX or Chapter XVII of IPC, etc., has been instituted on or before filing of the declaration, etc. In this case, the first information report was registered on 22.4.1998 and the charge sheet was filed on 30.1.2004 and the declaration was made on 18.1.1999. It is incorrect on the part of the learned Public prosecutor to say that the registering of a case on the basis of first information report made, amounts to institution of prosecution."

The above discussion establishes following conclusions:

(a) Mere registration of FIR does not necessarily result into initiation of proceedings for prosecution. It is only on submission of a report under Section 169 or Section 173(2) of the Code that Magistrate takes cognizance and may proceed in accordance with acceptable lawful material. The last word is thus with the Magistrate and not with the police. It may or may not result in initiation of proceedings for prosecution. Therefore, Magistrate may or may not accept the report of the police.

(b) After Magistrate takes cognizance and proceedings for prosecution are initiated in respect of criminal offences of cognizable nature then express permission of the Magistrate would be required. Therefore, it would certainly be beyond the domain of Settlement Commission to grant immunity after proceeding for prosecution has commenced. It is only before that stage alone that the Settlement Commission would be competent to grant immunity within the meaning of proviso to Section 127H of the Act. The underlying principle adopted in the proviso to Section 127-H of the Act is that once the proceedings for any such offence have been instituted in the sense that the Magistrate has taken cognisance then the

Settlement Commission would not be competent to grant immunity.

On principle and the policy of criminal law as reflected in various provisions of the Code, we are inclined to accept the submission made by learned counsel for the petitioner that expression proceedings for the prosecution for an offence cannot be regarded to have commenced on the registration of FIR, which expression necessarily implies element of magisterial intervention. Therefore, it is only when a charge sheet is presented before the Magistrate that it could be said that proceedings for the prosecution for any offence have been instituted. The question posed in the first para is answered accordingly.

When the aforementioned principles are applied to the facts of the present case, it is clear that FIRs in this case were registered on 12.7.2004 and 3.4.2005 and the application under Section 127-B of the Act was filed before the Settlement Commission-respondent No. 3 on 31.1.2006. The challans were presented on 6.3.2006 and 27.3.2006, which are obviously after the date of filing of application under Section 127-B of the Act. Therefore, the impugned order dated 14.9.2006 (P-5), passed by the Settlement Commission-respondent No. 3 is not sustainable to the extent it refuses to grant immunity to the petitioner from prosecution.

For the reasons stated above, this petition succeeds. The order dated 14.9.2006 in so far as it refuses to grant immunity to the petitioner for prosecution (P-5) is hereby quashed. The petitioner is accordingly granted immunity exercising power under proviso to

Section 127-H of the Act, which shall remain subject to other provisions of Section 127-H of the Act.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

August 8, 2007
Pkapoor

FIR FOR INDEXING